

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

GENEVIEVE JOE)	
Claimant)	
VS.)	
)	Docket No. 1,044,235
POWERPLANT MAINTENANCE SPECIALISTS)	
Respondent)	
AND)	
)	
COMMERCE & INDUSTRY INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant appealed the November 1, 2010, Award entered by Administrative Law Judge Rebecca A. Sanders. The Workers Compensation Board heard oral argument on February 18, 2011.

APPEARANCES

Mitchell W. Rice of Hutchinson, Kansas, appeared for claimant. John David Jurcyk of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for a February 28, 2008, back injury. In amended applications for hearing claimant filed, claimant also alleged a repetitive use back injury culminating on February 9, 2009.

In the November 1, 2010, Award, Judge Sanders determined: (1) claimant did not file a timely written claim; (2) claimant did not suffer a repetitive use injury but was injured on February 28, 2008; (3) claimant did not suffer any permanent impairment; and (4) there

is no evidence of any permanent injury. The Judge denied claimant's request for workers compensation benefits.

Claimant contends she has proven she provided timely written claim to respondent and that the evidence as to timely written claim is uncontroverted. Further, claimant argues she has proven that she has a whole body functional impairment and that she is entitled to an 85 percent work disability¹ based upon a 69 percent task loss and a 100 percent wage loss. Claimant requests the Board modify the November 1, 2010, Award.

Conversely, respondent requests the Board affirm the Award. Respondent argues claimant failed to serve a timely written claim. Additionally, respondent maintains claimant failed to establish she sustained permanent impairment as a result of her work accident.

The issues before the Board on this appeal are:

1. What is the correct date of accident?
2. Did claimant provide respondent with timely written claim?
3. If so, what is the nature and extent of claimant's disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

At the February 18, 2011, oral argument before this Board, claimant's attorney announced claimant was abandoning her alternative claim that she was injured in a series of microtraumas culminating on February 9, 2009. At the oral argument, respondent's counsel did not object to an accident date of February 28, 2008, and, therefore, the date of accident is February 28, 2008.

On February 28, 2008, (claimant's birthday) claimant, whose job title with respondent was top helper, was bending down to give a co-worker a tool and felt a pain in her back.² She told her husband, who was a welder and claimant's co-worker, that her back was hurting. Claimant's husband informed claimant's supervisor and claimant was

¹ A permanent partial disability under K.S.A. 44-510e that is greater than the whole person functional impairment rating.

² Joe Depo. at 15.

taken by ambulance to the St. Marys Clinic. The claimant completed no paperwork for her employer at the time, but did undergo follow-up treatment at St. Francis in Topeka.³

Following her injury, claimant returned to work for her employer, where she worked in the office in human resources until she was laid off in January 2009.⁴ Claimant received no additional authorized medical treatment after March 31, 2008.⁵ Claimant indicated that before her layoff she told respondent that she wanted to see another doctor but respondent did not grant her request.⁶ The record indicates that while on a visit home in Arizona in August 2008, claimant received treatment on her own for her back.

Claimant's testimony indicates she had conversations regarding her back with supervisors or other personnel, but she can only recall the names of two safety personnel – Tim Boswell with Westar (claimant was working at a job site controlled by Westar), with whom she spoke in March of 2008 when she asked him for an ice pack for her back,⁷ and Marilyn Nichols, respondent's safety clerk. However, claimant could only recall she spoke about her back with Ms. Nichols on an unknown date near the time of her layoff.⁸

Claimant testified that she later told Mr. Boswell when she was laid off that her back was still hurting⁹ and a Michael Medock got upset at her. Significantly, claimant testified there was nothing about her human resources work after March 31, 2008, that permanently injured her back.¹⁰ Claimant has not worked since being discharged by her employer. Claimant filed an Application for Hearing on February 10, 2009, alleging a traumatic injury on February 28, 2008. Four months later, claimant filed an amended Application for Hearing alleging a series of accidents each and every working day with a date of accident of February 9, 2009.

Administrative Law Judge Rebecca A. Sanders concluded claimant suffered a traumatic injury on February 28, 2008, and by her own admission was not permanently injured after that date. Judge Sanders noted the last authorized treatment the claimant

³ *Id.*, at 18-19.

⁴ *Id.*, at 29-30.

⁵ *Id.*, at 32 and 37.

⁶ R.H. Trans. at 12.

⁷ Joe Depo. at 32-34.

⁸ *Id.*, at 49-50.

⁹ *Id.*, at 50-51.

¹⁰ *Id.*, at 57.

received was on March 31, 2008, and the Judge indicated the earliest written document that could constitute a written claim would be claimant's Application for Hearing filed on February 10, 2009, well after the statutory 200-day period to make timely written claim,¹¹ which in this case expired on October 17, 2008.¹² Judge Sanders found claimant failed to file a timely written claim and denied claimant's request for benefits. The Judge also determined that if it were found claimant filed a timely written claim, claimant did not suffer any permanent impairment and there was no evidence of any permanent injury.

Claimant relies on her testimony regarding a document from the St. Marys Clinic to support her position that she provided timely written claim. Claimant testified as follows:

Q. (Mr. Rice) Ma'am, you testified earlier that you didn't remember ever getting any pieces of paper from any medical provider related to your injury. Do you remember that?

A. (Claimant) Mm-hmm.

Q. Is that a yes?

A. Yes.

Q. And did you fax me or did your husband fax me records from the Quality Inn --

A. Yes.

Q. -- you remember doing that? Okay.

MR. RICE: Elizabeth, I'll show you -- and this is contained in your stack. Going to focus on the far left.

Q. It appears to be from St. Mary's Clinic and it's dated the date of injury, 2-28-2008, and it's kind of hard to read, but best I can make out, it says 'Genevieve was seen in the ER. Please excuse her from work through 3-3-2008. Thank you.' And then it's signed by the physician. You see that?

A. Uh-huh.

Q. If you faxed this to me, obviously you had this piece of paper. Correct?

A. Yeah.

Q. So you would have had to have been given that at the facility that date?

¹¹ K.S.A. 44-520a.

¹² ALJ Award (Nov. 1, 2010).

A. Yeah, at the hospital.

Q. Did you ever take this to the employer to show them that you'd been taken off work?

A. Yeah, all the papers that they request for, they give it to them.

Q. Okay. Also wanted to show you, there's two forms, occupational medicine treatment forms, one of them from the date of injury, 2-28-2008, and then another one -- no, they're identical.

MS. DOTSON; That's from March.

Q. Okay. 3-12-08 and 3-5-08. Okay. And it addresses your work status. It looks like on March 5, 2008, they at least put your work status to regular duty, checked it as work related, and then a doctor signed it. Do you see that?

A. Yeah.

Q. Do you remember whether this form was given to you to give to your employer?

A. Yeah, I think so.

Q. And the reason I'm asking is if they're addressing work status, wouldn't you need to let your employer know what your work status is?

A. Yeah.

Q. And how would you do that?

A. Give them a copy of -- give them a -- give them a copy of this.¹³

These documents were never put into evidence.

Claimant's testimony is confusing and at times inconsistent. When asked by her counsel if she gave her employer papers showing she had been taken off work, she replied, "Yeah, all the papers that they request for, they give it to them."¹⁴ This infers that someone other than claimant sent the documents taking the claimant off work to her employer.

¹³ Joe Depo. at 58-60.

¹⁴ *Id.*, at 59.

Claimant previously indicated that she did not complete any paperwork on February 28, 2008, with her employer regarding her work injury.¹⁵ At her deposition, claimant also testified she did not notify her employer in writing that she wanted workers compensation benefits, nor did she give anyone at her employer a piece of paper regarding her work injury.¹⁶

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.¹⁷ The burden of proof means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.¹⁸

Claimant cites the recent Board Order in *Camp*¹⁹ for the proposition that the document from the St. Marys Clinic she believes she gave to her employer constituted a timely written claim. However, the facts in that case differ significantly from the current case. Mr. Camp alleged a repetitive injury through April 18, 2008, his last date at work. A medical report from a treating physician listing additional restrictions was provided by Mr. Camp to his employer on April 1, 2008.²⁰ This Board ruled the written medical report was legally sufficient to qualify as a written claim for compensation and that a written claim need not take any particular form, so long as it is in fact a claim.²¹ The Board held the requirements of K.S.A. 44-520a were satisfied and written claim was timely provided.

In the current case, the Board finds claimant did not meet her burden of proof to show the document from St. Marys Clinic was provided to her employer within 200 days after March 31, 2008.

No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified

¹⁵ *Id.*, at 18.

¹⁶ *Id.*, at 39.

¹⁷ K.S.A. 2007 Supp. 44-501(a) and K.S.A. 2007 Supp. 44-508(g).

¹⁸ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

¹⁹ *Camp v. Bourbon County*, Nos. 1,001,697 & 1,044,337, 2010 WL 3093216 (Kan. WCAB July 30, 2010) (*appealed to the Kansas Court of Appeals*).

²⁰ *Id.*

²¹ *Fitzwater v. Boeing Airplane Co.*, 181 Kan. 158, 309 P.2d 681 (1957).

mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation²²

The Board finds claimant has failed to prove she provided respondent with timely written claim. Accordingly, the Award is affirmed.

The issue of the nature and extent of claimant's disability is moot.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.²³ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board affirms the November 1, 2010, Award entered by Judge Sanders.

IT IS SO ORDERED.

Dated this ____ day of March, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Mitchell W. Rice, Attorney for Claimant
John David Jurcyk, Attorney for Respondent and its Insurance Carrier
Rebecca A. Sanders, Administrative Law Judge

²² K.S.A. 44-520a(a).

²³ K.S.A. 2010 Supp. 44-555c(k).